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Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 938.

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court below has not been published. It is found in the Transcript of Record at pages 268 to 276 inclusive.

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A., Tit. 28, Sec. 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is February 1, 1943 (R. 276); petition for rehearing was filed February 20, 1943, within the time prescribed by the Rules of the Fifth Circuit Court of Appeals (R. 277); the petition for rehearing was denied without opinion March 12th, 1943 (R. 320); motion to stay the mandate was filed March 17, 1943 (R. 320); on March 17, 1943, the issuance of the mandate was ordered stayed for thirty days from said date, which is the date of the entry of the last order in the Circuit Court of Appeals for the Fifth Circuit (R. 322).

3. Petitioners invoke the jurisdiction of this Court on these grounds: (a) That in construing Art. 2317 and 2320, La. Rev. Civ. Code, so as to permit recovery against a newspaper publisher for the torts of its carrier only when the publisher might have prevented but did not prevent the act, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, conflicts with applicable decisions of this Court, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725; (b) That in failing to follow the most recent decisions of the Louisiana Courts of Appeal on the subject of the liability of a newspaper publisher for the torts of its carrier, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A.,

Sec. 725; (c) That in failing to follow the most recent decisions of the Louisiana Courts of Appeal on the liability of a newspaper publisher for the torts of its carrier, the Fifth Circuit Court of Appeals has rendered a decision conflicting with the decisions of this Court and with the decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals which hold that, where coordinate decisions of state courts are conflicting, the Federal Courts are bound to accept the latest decision as determining the state law; (d) That the opinion of the Fifth Circuit Court of Appeals in the case at bar conflicts with a decision of the Tenth Circuit Court of Appeals; (e) That in finding against the petitioners in whose favor a jury verdict has been rendered in the District Court, the Circuit Court of Appeals deprived your petitioners of the right to trial by jury as guaranteed to them by the Seventh Amendment to the Constitution of the United States, thereby deciding a federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court holding that no finding of fact made by a jury in a law case upon substantial evidence can be reexamined by the Judge or Judges of a Federal Court.

III.

STATEMENT OF THE CASE.

The essential facts of this case are stated in the petition for certiorari under the heading "Summary Statement of Matters Involved" (Petition for Certiorari, pages 3 to 8 inclusive). In the interest of brevity those facts will not be restated here.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Fifth Circuit, below, committed the following errors:

1. The Court below erred in construing Arts. 2317 and 2320, La. Rev. Civ. Code, to render a master or employer liable under the doctrine of *respondeat superior* only when the master or employer "might have prevented but did not prevent the act which caused the danger." This construction is directly contrary to the controlling jurisprudence of Louisiana. Louisiana jurisprudence unequivocally holds that the last sentence of Article 2320 (which suggests that the liability of employers is limited to cases in which the employers "might have prevented the act which caused the damage and have not done it") does not operate to effect a limitation on the liability of corporate employers. The Circuit Court of Appeals below had no right to construe the Louisiana Code without giving effect to the construction thereof adopted and recognized by the Courts of Louisiana.

2. The Court below erred in holding the evidence in the case at bar insufficient to make a case for the jury. In so doing the Court below decided a question of local law in a way which conflicts with the applicable jurisprudence of Louisiana contrary to Section 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725.

3. The Court below erred in failing to ascertain and apply the applicable Louisiana jurisprudence governing the liability of a corporate Louisiana newspaper publisher for the torts of its motor carrier delivering its papers on a specified route under an oral agreement terminable at the will of the publisher. And in this connection the Court below erred in failing to follow the controlling and most recent decisions of the Louisiana Courts of Appeal on the precise point involved. *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing (La. App., 1939), 191 So. 713, cert. granted by Louisiana Supreme Court (Appendix to Petition, page 25), certiorari vacated by stipulation of compromise (Appendix to Peti-

tion, page 26). This action of the Court below violated the doctrine announced by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, *West* v. *American Telephone and Telegraph Company,* 311 U. S. 223, *Stoner* v. *New York Life Insurance Co.,* 311 U. S. 464, *Six Companies of California* v. *Joint Highway District No. 13 ~~by~~ of California,* 311 U. S. 180, and in *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, which require the Federal Courts, in diversity of citizenship cases, to apply the state law as declared by the state intermediate Courts of Appeals in the absence of a decision on the point involved by the highest court of the state.

4. The Court below erred in disregarding the decisions of the Louisiana Courts of Appeal upon the identical factual and legal issues involved in the case at bar (the liability of a corporate newspaper publisher for the acts of its motor carrier delivering papers on a prescribed route under a contract terminable at the will of the publisher) and erred in deciding the case on the basis of general law (contrary to the controlling Louisiana Courts of Appeal decisions), deduced from: (1) general statements found in an earlier Louisiana Supreme Court decision dealing with an entirely different fact situation; (2) cases from foreign jurisdictions; and, (3) common law text references. This action constituted a failure to ascertain and apply the applicable local jurisprudence, contrary to Section 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725, to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, to *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, and to other decisions of this Court.

5. The Court below erred in rendering a decision contrary to decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals which hold that, in diversity of citizenship cases, the Federal Courts are bound to accept the most recent state court decisions on the subject as establishing the state law. In the case at bar the

Court below chose to rely on its interpretation of an earlier decision of the Louisiana Court of Appeal dealing with the liability of a newspaper publisher, *Abate* v. *Hirdes,* (1929) 9 La. App. 688, 121 So. 775, rather than to rely on the more recent cases of the Louisiana Courts of Appeal precisely in point. *Ravare* v. *McCormick and Co.,* (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts,* (La. App., 1939) 187 So. 351, reversed on rehearing on other grounds (La. App.), 191 So. 713, cert. granted by Louisiana Supreme Court (Appendix to Petition, page 25), cert. vacated by stipulation of compromise (Appendix to Petition, page 26).

6. The Court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee," was not sufficient to take the case to the jury. This holding of the Court below conflicts with the decision of the Tenth Circuit Court of Appeals in *Ryan-Richards, Inc.,* v. *Whitesides,* (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeals in *Jones* v. *Shehee Ford Wagon and Harness Co., Inc.,* (1934) 163 So. 129.

7. The Court below erred in holding that the motion for directed verdict of the respondent Great American Indemnity Company should have been sustained, because: (a) there was sufficient evidence to make a case for the jury under the applicable Louisiana jurisprudence; and, (b) such holding violated the Seventh Amendment to the Constitution of the United States guaranteeing the right to trial by jury in civil cases and forbidding the re-examination in any Court of the United States of any fact tried by a jury.

V.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals below failed to give to Articles 2317 and 2320, La. Rev. Civ. Code, the construction it was bound to give these Articles under the Federal law.

(a) The construction given a Louisiana Code provision by the Courts of Louisiana is binding on the Federal Courts.

(b) The last sentence of Art. 2320, La. Rev. Civ. Code, as construed by the Courts of Louisiana does not operate to effect a limitation on the liability of corporate employers.

(c) The Circuit Court of Appeals below held, contrary to Louisiana jurisprudence, that the last sentence of Art. 2320, La. Rev. Civ. Code, limits the liability of Louisiana corporate employers.

2. The Circuit Court of Appeals below erred in holding the evidence in the case at bar insufficient to make a case for the jury.

(a) Under section 34 of the Judiciary Act of 1789 the Circuit Court of Appeals was bound to follow the applicable jurisprudence of Louisiana.

(b) The decision of the Circuit Court of Appeals in the case at bar is contrary to the applicable jurisprudence of Louisiana.

(c) The decision of the Circuit Court of Appeals below is in conflict with decisions of the Fourth, Seventh, Eighth, and Ninth Circuit Courts of Appeals which hold that, in diversity of citizenship cases, the Federal Courts are bound to accept the most recent state court decisions on the subject as establishing the state law.

(d) The Court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee," was not sufficient to take the

case to the jury. This holding of the Court below conflicts with the decision of the Tenth Circuit Court of Appeals in *Ryan-Richards, Inc.*, v. *Whitesides*, (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeal in *Jones* v. *Shehee Ford Wagon and Harness Co., Inc.*, (1934) 163 So. 129.

(e) The decision of the Circuit Court of Appeals below holding that, as a matter of law, the respondent insurer was not liable, deprives the petitioners of the right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

VI.

ARGUMENT.

It is not always easy, in cases involving application of local law by Federal Courts, to demonstrate to this busy Court the failure of the Federal Court below to properly ascertain and apply the local law. Consciously or unconsciously the opinion of the Court below may "by the practice of logomachy" be "so bewordled" that the departure from local principles of law is not readily apparent. If the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is to have real meaning and force, this Court should exercise its power of superintending control in cases, not only where the lower court expressly refuses to apply the applicable local law, but also in cases where the lower court professes to apply local law but in fact does not.

To be more specific, this Court should protect litigants in diversity of citizenship cases from application of a Judge's personal hunch or intuition instead of the jurisprudence applicable to the case. The author of the opinion below, Judge Hutcheson, in an interesting exposition of his judicial philosophy reveals a tendency to minimize case law as a guide to decision. In Hutcheson, Judgment Intuitive (The Foundation Press, Inc., Chicago, Illinois, 1938) at pages 23 and 24, Judge Hutcheson describes his method of deciding and writing his decision of a case before him as follows:

> "I remember once, in the trial of a patent case, it was contended with great vigor on the one side that the patent evidenced invention of the highest order, and with equal vigor on the other that the device in question was merely a mechanical advance. I announced, almost without any sense of incongruity, that I would take the case under advisement, and after 'having well and exactly seen and surveyed, overlooked, reviewed, read and read over again' all of the briefs, the authorities and the record, would wait a while before deciding, to give my mind a chance to

hunch it out. For I knew if there was the flash of invention in the device my mind would give back an answering flash; while if there was none, my mind would, in a duly cogitative way, find only mechanical advance.

"One of the lawyers, himself a 'huncher,' smiled and said—'Well, Your Honor, I am very grateful to you for having stated from the Bench what I have long believed, but have hesitated to avow, that next to the pure arbitrament of the dice in judicial decisions, the best chance for justice comes through the hunch.' The other lawyer, with a different type of mind, only looked on as though impatient of such foolery.

"But I, proceeding *according to custom*, got my hunch, found invention and infringement, and by the practice of logomachy so bewordled my opinion in support of my hunch that I found myself in the happy situation of having so satisfied the intuitive lawyer by the correctness of the hunch, and the logomachic lawyer by the spell of my logomachy, that both sides accepted the result and the cause was ended" (Italics ours).

The practice of the "hunch" or "intuition" in the decision of cases may be an interesting and fruitful experiment, but it violates Section 34 of the Judiciary Act of 1789 which requires application of the local jurisprudence. Furthermore, the chances for error in formation of the "judgment intuitive" are multiplied when the Judge is a Texas common law lawyer and the law under consideration is the Louisiana Civil Code.

Since, under the Judiciary Act and the decisions of this Court, it is the object, in diversity of citizenship cases, to secure in the Federal Court the same result that would have been secured in a local court, where the case would have been tried except for the fortuitous circumstance of diversity of citizenship, the applicable local jurisprudence should be carefully ascertained and strictly followed. Petitioners submit that this has not been done in the case at bar.

1. The Circuit Court of Appeals below failed to give to Arts. 2317 and 2320, La. Rev. Civ. Code, the construction it was bound to give these Articles under the Federal law.

(a) The construction given a Louisiana Code provision by the Courts of Louisiana is binding on the Federal Courts.

Even before the decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the Federal Courts applied enactments of local legislatures in accordance with the interpretations given to such enactments by the state's highest courts. This rule, under the decisions of this Court, is still in force after the decision in the Erie case. See *Moore* v. *Illinois Central Railroad Company,* 312 U. S. 630, l. c. 634, where it is said (85 L. Ed., at 1092):

> "But even before the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: 'The construction given to a statute (of limitations) of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations."

We will not extend the argument under this point because we do not believe that it will be challenged.

(b) The last sentence of Art. 2320, La. Rev. Civ. Code, as construed by the Courts of Louisiana does not operate to effect a limitation on the liability of corporate employers.

Arts. ~~2137~~ 2317 and 2320, La. Rev. Civ. Code, are as follows:

> "2317. (2296) (N 1384). Liability as *Respondeat Superior.*—Things in Custody.—We are responsible,

not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

"2320 (2299) (N 1384). Masters, Teachers and Artisans—Liability.—Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. Teachers and Artisans are answerable for the damage caused by the scholars or apprentices while under their superintendence. In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage and have not done it."

The last sentence of Article 2320 above suggests that the liability of employers is limited to cases wherein the employer is able to prevent the act which caused the damages, and has not done it. Such a construction of this provision of the Civil Code of Louisiana was adopted by the Circuit Court of Appeals below in finding against these petitioners.

The jurisprudence of Louisiana construing these Articles of the Code and construing the last sentence of Article 2320 is squarely contrary to the construction adopted by the Circuit Court of Appeals below. The Supreme Court of Louisiana and the Louisiana Courts of Appeal have made it clear that the last sentence of Article 2320 of the Civil Code does not operate to effect the limitation in the cases of corporate employers. *Ragas* v. *Douglas,* (1916) 139 La. 773, 72 So. 242; *Weaver* v. *W. L. Goulden Logging Co.,* 116 La. 473, 40 So. 798.

In *Ragas* v. *Douglas, supra,* defendant filed an exception of no cause of action based upon the failure of plaintiff to allege that defendant might have prevented the act which caused the damage and did not do so, the act having been committed by defendant's employee. The Court

overruled the exception. The Court made it clear that the apparent limitation in the Article 2320 of the Civil Code would not be enforced. The Supreme Court said:

> "It is conceded to be the settled jurisprudence of this court, with respect to corporations and partnerships, that, construing article 2320 of the Civil Code as a whole, the last paragraph, which purports to limit the liability of masters and employers (as imposed by the first paragraph) for damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed, to cases in which they 'might have prevented the act which caused the damage, and have not done it,' *does not operate to effect that limitation*" (Italics ours).

And, further in the opinion, quoting with approval from *Weaver* v. *W. L. Goulden Logging Co.*, (1906) 116 La. 468, l. c. 473-474, 40 So. 798, the Court said:

> "It therefore may be said that the restriction on the liability of masters embodied in article 2320 (2299) of the Civil Code *has been construed out of the text*, for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article."

From these cases it appears clear that Article 2320, as applied and construed by the courts of Louisiana, is not subject to the construction and effect given that Article by the Circuit Court of Appeals below in reversing the judgment in favor of the petitioners.

(c) The Circuit Court of Appeals below held, contrary to Louisiana jurisprudence, that the last sentence of Art. 2320, La. Rev. Civ. Code, limits the liability of Louisiana corporate employers.

It seems clear from the opinion of the Court below that the Court below relied upon its erroneous construction of Articles 2317 and 2320, La. Rev. Civ. Code, in setting aside the judgment of the District Court based upon a jury verdict. This appears not only from the citation of Articles 2317 and 2320 to sustain the judgment of the Court but also from the incorporation in the opinion it-

self of language paraphrasing the last sentence of Article 2320 as follows (R. 275);

> "If the relationship of master and servant existed and Ewell was driving the company's automobile, or his automobile, under an arrangement which constituted a hiring of himself and his automobile to the company as its servant, so that the company would or could control the means to be employed in, and the manner of doing, the work, *and therefore might have prevented but did not prevent the act which caused the danger, the doctrine of respondeat superior would apply*" (Italics ours).

Therefore, from the language of the opinion of the Court below it appears that the judgment of the Court below is based upon its erroneous and incorrect construction of Articles 2317 and 2320 contrary to the jurisprudence of Louisiana as announced by the highest court of the state.

2. The Circuit Court of Appeals below erred in holding the evidence in the case at bar insufficient to make a case for the jury.

(a) Under Section 34 of the Judiciary Act of 1789, the Circuit Court of Appeals was bound to follow the applicable jurisprudence of Louisiana.

The jurisdiction of the District Court in this case rested solely upon diversity of citizenship. Only because the respondent insurer, Great American Indemnity Company, was a corporation domiciled in New York was the action instituted in Federal Court. The rights and liability of the parties in state and federal courts should be measured by the law of Louisiana, the state in which the casualty involved occurred and the state of residence of the claimants and the tort feasors. Under these circumstances, whether the legal responsibility of the parties is measured by Louisiana Code provisions or by local judicial decisions, or both, the Federal Courts, hearing the cause, were bound to follow the applicable law, or juris-

prudence, of Louisiana. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *West* v. *American Telephone and Telegraph Company,* 311 U. S. 223; *Moore* v. *Illinois C. R. Co.,* 312 U. S. 630.

(b) The decision of the Circuit Court of Appeals in the case at bar is contrary to the applicable jurisprudence of Louisiana.

This case involved the liability, under the jurisprudence of Louisiana, of a corporate Louisiana newspaper publisher under the doctrine of *respondeat superior* for the torts of a motor carrier delivering the publisher's newspapers daily over a prescribed route under an oral agreement terminable at the will of the publisher. There were controlling decisions of the Louisiana Courts of Appeal dealing with such liability in cases involving practically identical fact situations. *Ravare* v. *McCormack & Co.,* (La. App., 1936), 166 So. 183; *Gallaher* v. *Ricketts,* (La. App., 1939), 187 So. 351, reversed on rehearing (La. App., 1939), 191 So. 713, cert. granted by the Louisiana Supreme Court (Appendix, page 25), certiorari vacated by stipulation of compromise (Appendix, page 26).

There was no decision of the Louisiana Supreme Court dealing with a substantially identical factual and legal situation. If the case had been tried in the courts of Louisiana (where it would have been tried except for diversity of citizenship), the decisions in the Ravare case and the Gallaher case would have been applied and followed.

THE RAVARE CASE.

In the Ravare case (decided in 1936 by the Louisiana Court of Appeal for the Second Circuit), the newspaper publisher, McCormick and Company, was sued under the doctrine of *respondeat superior* for personal injuries sustained by the plaintiffs Louis and Stella Ravare, for the negligence of its carrier Lacombe while engaged in delivering a daily newspaper published by the defendant McCormick and Company. The defendant publishing com-

pany defended on the ground that the carrier Lacombe was not the agent and employee of the publishing company but an independent contractor. It was the job of the carrier Lacombe to deliver the company's publication over a specific hundred mile route and through three towns. "The very nature of the employment involved here made it impracticable and impossible for the company to control or supervise the carrier's acts after he left the company's quarters" (166 So. l. c. 186). The publishing company kept a record listing the customers and agents on Lacombe's route. Customers could make arrangements for delivery of the paper either through Lacombe, the carrier, or through the company. Checks for subscriptions were receivable by Lacombe or by the company, and cash likewise. Lacombe worked on a commission basis and was paid, in addition to his commission, a weekly allowance of about $10 which he used to pay his expenses and from which he could get his commission. Lacombe, the carrier, did not get enough out of his route in commissions to justify his time and expenses. Lacombe was expected to gain circulation, and deliver his papers within a reasonable time. Customer subscribers could look to the publishing company for delivery of their papers. The circulation manager could cancel the agreement with Lacombe, the carrier, and put a new man on the route if it chose to do so. The evidence was conflicting on the issue of whether the automobile used by the carrier, Lacombe, was owned by Lacombe or the publishing company.

Upon this state of facts, which is practically identical with that of the case at bar, the Court of Appeal of Louisiana for the Second Circuit held that the corporate newspaper publisher was responsible for the torts of its carrier committed while delivering its papers over the prescribed route. The defense that the carrier was an independent carrier contractor was expressly considered and denied. The conclusion of the Circuit Court of Appeals below, in the case at bar, is directly in conflict with the decision of the Ravare case.

THE GALLAHER CASE.

The case of *Gallaher* v. *Ricketts,* 187 So. 351, reversed on rehearing 191 So. 713, is in point. The Orleans Court of Appeal, in 1939, in 187 So. 351, awarded damages against the Times-Picayune Publishing Company for injuries suffered by the plaintiff when struck by an automobile driven by one Ricketts. The publishing company contended that Ricketts was an independent contractor. Coleman, the circulation manager, testified that Ricketts was employed under a written contract. Ricketts was a route carrier of newspapers, not employed for any specific length of time. He received no regular salary, and paid for the papers delivered to him, his compensation being in the form of a commission of 40c on every $1 worth of papers disposed of. He used his own automobile in making deliveries, and was paid a fixed allowance of $5 a week for his car expenses. Defendant contended it did not care whether Ricketts delivered papers on foot, by car, or in a push cart, although he could not have covered the route assigned to him unless he used a car. The carrier Ricketts was not employed for any specific length of time and the publisher could at its pleasure dispense with his services and put another carrier on the route. It was contended by the publisher in the Gallaher case, as here, that the carrier was an independent contractor. The Orleans Court of Appeal rejected the contention that the carrier was an independent contractor and held the publishing company liable in damages for the tort of the carrier. Judge Janvier dissented from this holding.

Thereafter, the Orleans Court of Appeal granted a rehearing and on rehearing, annulled its original decree and found that the publishing company was not liable because Ricketts was not at the time of the accident acting within the scope of his employment. See 191 So. 713. The Court, with Judge Janvier as its organ, did not depart from the principles enunciated in its original opinion, but

considered for the first time the proposition that Ricketts was not delivering papers when the accident happened, but was on his way to attend a "pep" meeting. The court held that he was not required or expected to use a car for that purpose, and therefore the publishing company was not responsible for the damage he did in so using his car. This expression is found in this second opinion (191 So. at 716):

> "We think that it may be said that there were two parts to the work which Ricketts was employed to perform. The first and most important was the delivery of papers. In this part of his work defendant was interested in having him use his automobile. It paid a part of the expense of operation and made itself liable for any negligence of which he might be guilty while so delivering papers. * * *"

The Court then said Ricketts' second duty was to attend "pep" meetings, which did not require the use of a car, and that so far as the defendant publishing company was concerned, the automobile was identified solely with the delivery of its newspapers.

So the last published expression of a Louisiana appellate court in that case was strongly in favor of plaintiff's position in the instant case. But the Gallaher case did not end there. On application of the plaintiff a writ of certiorari was unanimously granted by the Supreme Court of Louisiana (Appendix to Petition, page 25). No further published account of the case appears. But in the records of the Office of the Clerk of the Supreme Court of Louisiana, in the matter entitled *"Miss Laura Gallaher* v. *Mrs. Nathaniel W. Ricketts et al.,"* No. 35619 on the docket of the said Supreme Court, is found an order vacating the writ of certiorari issued by the Supreme Court, on the ground that the matter had been compromised and settled. The order was signed and filed February 5, 1940, and it shows that the writ was granted on application of the plaintiff (Appendix to Petition, page 26).

We submit that by granting a writ on plaintiff's application in that case, the Supreme Court of Louisiana certainly indicated that it doubted the correctness of the final holding of the Orleans Court of Appeal which released the publishing company, from liability, even though Ricketts was not delivering papers at the time of the accident. The fact that the writ was granted on plaintiff's application shows that the Supreme Court must have felt that the publishing company should be held liable for Ricketts' act while going to a "pep" meeting, as well as while delivering papers.

The holding of the Circuit Court of Appeals below, in the case at bar, is directly in conflict with the jurisprudence of Louisiana as exemplified by the Gallaher case.

These most recent and controlling decisions of the Louisiana Courts of Appeal in the Ravare case and Gallaher case were not even cited in the opinion of the Court below.

It is one thing for a Circuit Court of Appeals to announce boldly that it will not follow the applicable local case law; that is a matter which can be readily seen and corrected by this Court under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. It is quite another thing for a Circuit Court of Appeals to state that it is ascertaining and applying local law—apparently buttressing its opinion with citations of two misconstrued articles of the Civil Code, three local cases, nine foreign cases and two sections of the American Law Institute's Restatement of the Law of Agency—when, in fact, it blandly refuses to follow, or even cite, the only applicable local case law dealing with either the meaning of the Articles of the Civil Code of Louisiana in question, or the tort liability of corporate employers upon facts practically identical with the case at bar; that is a matter which can be detected only by determining whether or not the Circuit Court of Appeals correctly ascertained and applied the local law.

If the principles announced by this Court in *Erie R. Co.* v. *Tompkins,* and the cases following that case are to have any validity and effect, it should not be possible for a Circuit Court of Appeals, while rendering lip service to those principles by means of an indiscriminate citation of non-applicable local case-law, to reject applicable and controlling case materials and then, by refusing to cite such applicable and controlling case materials to conceal its disregard of the local state law.

AUTHORITIES CITED BY THE COURT BELOW.

The Circuit Court of Appeals below cited only three Louisiana cases in its opinion. The Court below quoted from and cited the case of *Robideaux* v. *Hebert,* 43 So. 887, as the controlling basis for its decision.

That case, which was decided by the Supreme Court of Louisiana in 1907 dealt with a situation in which a railroad company had furnished Hebert with a spreader under a contract whereby Hebert was to construct a fill for the railroad. In the operation of the spreader Hebert killed the plaintiff's decedent. Hebert and the railroad company were sued on the theory that Hebert was an employee of the Company. The Company defended upon the ground that Hebert was an independent contractor. Although the evidence set forth in the case is meager as to the details of the arrangement between Hebert and the Company the Court held that it was clear from the evidence that Hebert was an independent contractor in the construction of the fill.

The delivery of newspapers to subscribers, as found in the instant case, is a type of work which is far different from that performed by a contractor who is engaged to construct a fill for a railroad company. It does not seem that an adjudication in the "railroad fill" case should be a controlling authority as to a set of facts involving a newspaper motor carrier.

The Circuit Court of Appeals below also cited the Louisiana case of *Marquez* v. *LeBlanc*, (1932) 143 So. 108, in full support of its judgment. That case involved the liability of the Agricultural Credit Corporation for an accident in which one LeBlanc, a crop examiner, was involved. In that case there was no evidence whatever to the effect that LeBlanc, at the time of the accident, was performing any work for the Agricultural Credit Corporation. LeBlanc could go or come as he chose and was not under any one's supervision.

It seems apparent that an adjudication as to the status of a crop examiner, such as LeBlanc, in the cited case, has no bearing whatsoever upon the determination of whether or not a newspaper motor carrier who is delivering papers to subscribers is an employee.

The Circuit Court of Appeals below also cited the Louisiana case of *Abate* v. *Hirdes*, (1929) 121 So. 775, which was decided seven years prior to the case of *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and ten years prior to the case of *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing on other grounds (La. App., 1939) 191 So. 713, cert. granted Louisiana Supreme Court (See Appendix to Petition, page 25), writ vacated by stipulation of compromise February 5, 1940 (See Appendix to Petition, page 26). These latter cases, discussed hereinbefore, are the ones relied upon by petitioners.

The Abate case is the only Louisiana case cited by the Circuit Court of Appeals below which deals with the question of the liability of a corporate newspaper publisher for the torts of one who was, at the time of the accident, transporting newspapers which had been published by a defendant publisher. The facts in the Abate case are very scantily reported, and for that reason petitioner has set forth in Appendix III to this brief the verbatim report of the testimony of Christopher Hirdes, the truck driver defendant involved in that case (Appen-

dix, page 37). This testimony discloses that Hirdes was not a newspaper carrier who delivered papers to the ultimate reader-subscribers as did Ewell and Neyland in this case, but was a distributor of newspapers to dealers who would sell the newspapers to the public. Indeed, this aspect of the Abate case was recognized by the Court of Appeal of Louisiana when it said, in that case, at page 777 of 121 So:

> "Hirdes was nothing more than a distributor; acting independently; purchasing his wares from the manufacturer and selling them to his customers."

Moreover, in the Abate case, the truck driver had no prescribed route. His customers had no dealings or relationship with the newspaper publisher, as in the case at bar. Further, in the Abate case, it was said, in speaking of whether or not Hirdes was an independent contractor (121 So. at 776):

> "Whether or not he was an independent contractor or an agent depends upon whether or not the Item Company had the right of supervision and control. The actual exercise of that right is not essential. The question depends solely upon the existence of the right."

It thus appears that, in the Abate case, the evidence established the fact that Hirdes was a distributor who bought his papers from the publisher and sold them to dealers for resale, and that the newspaper publisher in that case did not have or exercise any supervision or control whatever over his activities. That case is entirely different from the case at bar wherein the newspaper publisher admitted that some supervision was exercised over Ewell and Neyland who were the newspaper motor carriers operating between the newspaper publisher and its ultimate reader-subscribers.

It thus appears that the Abate case, which is the only Louisiana case cited by the Circuit Court of Appeals below, which is in any way applicable to the case at bar,

is not in point on the facts and is also an authority for your petitioners upon the matter of law involved in this case, viz.: the existence of the right to control the employee's activities as establishing an employer-employee relationship.

The Circuit Court of Appeals below also cited, in "full support" of its decision, nine cases from jurisdictions other than Louisiana, only five of which cases dealt with the liability of newspaper publishers for the torts of its carriers. These cases from foreign jurisdictions were distributed as follows (it should be noted that Judge Hutcheson, who wrote the opinion, practiced law, and lived, in the State of Texas).

Texas: Three cases;
Michigan: One case;
Kentucky: One case;
Missouri: Two cases;
California: One case;
Wyoming: One case.

Although it is true that five of the above cases from foreign jurisdictions dealt with the liability of newspaper publishers for torts of their carriers and decided that the newspaper publishers were not liable for such torts because the carriers were, under the law of the states in question, independent contractors, such cases are not, under the decisions of this Court, to be regarded as controlling authorities in the State of Louisiana in the face of the decisions of the Louisiana courts in the cases of *Ravare* v. *McCormick & Co.*, (La. App., 1936), 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351.

Even if there be a body of "general common law" which is evidenced by the five out-state cases mentioned above, that "general common law" can have no application in Louisiana if, under the provisions of the Louisiana Civil Code and the applicable jurisprudence of Louisiana it has been determined that Louisiana has established and

follows a rule of law which is contrary to the so-called "general common law" rule and which states that a newspaper motor carrier is an employee of the corporate newspaper publisher for which he delivers papers so as to render that corporate newspaper publisher liable for his torts. It is for Louisiana, and Louisiana alone, to say what shall be "the Louisiana Law."

As was said by Mr. Justice Holmes in his dissenting opinion in the case of *Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Company,* (1928) 276 U. S. 518, at 533, 48 S. Ct. 404, 72 L. Ed. 681:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force."

And, on page 534, with special reference to the situation in Louisiana, Mr. Justice Holmes said:

> "Louisiana is a living proof that it need not be adopted at all. (I do not know whether under the prevailing doctrine we should regard ourselves as authorities upon the general law of Louisiana superior to those trained in the system.) Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the state alone to decide."

Lastly, in support of its judgment, the Circuit Court of Appeals cited Sections 2 and 250 of the American Law Institute's Restatement of the Law of Agency and a portion of Comment (a) which follows Section 250. It should be noted that Section 250 of the Restatement deals with the non-liability of a principal for the torts of an agent who is not a servant. The Court made no reference whatever to Section 220 of the Restatement of the

Law of Agency which sets forth the matters to be considered in arriving at a determination of whether one is an employee (for whose acts the employer is liable) or an independent contractor (for whose acts the principal is not liable). Petitioners mention this point only in passing inasmuch as it is petitioner's contention that the American Law Institute's Restatement of the Law of Agency, being a restatement of common law principles, has no application to, or force within, the State of Louisiana, unless and until the legislature or courts of that state have determined that a specific section of that Restatement is to be regarded as the law of Louisiana under the provisions of the Louisiana Civil Code.

Petitioners submit that the foregoing discussion of the applicability of Louisiana authorities clearly shows that the Circuit Court of Appeals below decided this case in a manner which is contrary to the applicable jurisprudence of Louisiana.

(c) The decision of the Circuit Court of Appeals below is in conflict with decisions of the Fourth, Seventh, Eighth, and Ninth Circuit Courts of Appeals which hold that, in diversity of citizenship cases, the Federal Courts are bound to accept the most recent state court decisions on the subject as establishing the state law.

In determining the applicability of local state law under Section 34 of the Judiciary Act of 1789, four United States Circuit Courts of Appeals have adopted the rule of decision that the most recent pronouncement of the state courts *must* be accepted by the Federal Courts as declaring the law of the state where coordinate decisions of a state's courts are assumed to conflict. The cases so declaring are as follows:

Fourth Circuit:

Dayton & Michigan R. Co. v. *Commissioner of Internal Revenue,* (1940) 112 F. 2d 627, l. c. 630.

Seventh Circuit:

Alexander v. *Missouri State Life Ins. Co.,* (1933) 68 F. 2d 1, l. c. 3.

Eighth Circuit:

Yoder v. *Nu-Enamel Corporation*, (1941) 117 F. 2d 488, l. c. 490.

Ninth Circuit:

Toole County Irr. Dist. v. *Moody*, (1942) 125 F. 2d 498, l. c. 501.

In the case at bar the Circuit Court of Appeals below ignored the latest pronouncements of the Louisiana Courts of Appeal in the cases of *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on other grounds 191 So. 713, which were fully discussed under Point 2 (b), *supra*, and chose to rely on its interpretation of the earlier Louisiana Court of Appeal decision in the case of *Abate* v. *Hirdes*, (1929) 121 So. 775. Petitioners have shown that the Abate case is not in conflict with these later decisions, under Point 2 (b) of petitioners' Argument, *supra*. If the Abate case conflicts or is assumed to conflict with these later cases, then the Court below has failed to follow the most recent declarations of state law as announced by the courts of Louisiana and has not followed the rule applied in the Fourth, Seventh, Eighth and Ninth Circuits in the cases cited above. The Fifth Circuit Court of Appeals has previously indicated that it did not feel bound by such a doctrine in the case of *Sabine Lumber Co.* v. *Broderick*, (1937) 88 F. 2d 586, l. c. 588, where it said, in speaking of a case in which there were conflicting decisions within the state:

> "Considering the conflict in the Louisiana jurisprudence, the District Court was entitled to follow the decisions he considered correctly stated the law."

This is an important question which will recur daily in the administration of justice by the Federal system of Courts in diversity of citizenship cases. This Court should determine the proper rule to be followed.

(d) The Court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee" was not sufficient to take the case to the jury. This holding of the Court below conflicts with the decision of the Tenth Circuit Court of Appeals in Ryan-Richards, Inc., v. Whitesides, (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeal in Jones v. Shehee Ford Wagon and Harness Co., Inc., (1934) 163 So. 129.

This point is, in our opinion, a very important one. In Louisiana jurisprudence the word "employee" is used to denote one for whose torts the employer is liable, while the term "independent contractor" is used to denote one for whose torts the employer is not liable. See *Jones v. Shehee Ford Wagon and Harness Co., Inc.*, (La. App., 1934) 163 So. 129, l. c. 132. The description of the motor carrier Ewell as a "class 1 employee" by the newspaper publisher in this case, when coupled with the other evidence herein, was amply sufficient to take the case to the jury, but the Circuit Court of Appeals below refused so to hold, and so rendered a decision which is in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Ryan-Richards, Inc.*, v. *Whitesides*, (Okla. 1938), 96 F. 2d 826. Limitations of time will not permit further treatment of this point, which is treated adequately and clearly in the paragraph numbered 6 in "Reasons Relied Upon For Allowance of Writ" in petitioners' Petition for Writ of Certiorari.

(e) The decision of the Circuit Court of Appeals below holding that, as a matter of law, the respondent insurer was not liable deprives the petitioners of the right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

Our position in respect to this point is stated in the Petition for Certiorari under the paragraph numbered 7 in "Reasons Relied Upon For Allowance of Writ." In a sense the point is involved in the question of applying the applicable local jurisprudence. It is also involved in a consideration of the right of a Judge to exercise his "intuition" to set aside a jury verdict. Our theory is that of Mr. Justice Black in his dissenting opinion in *New York*

Life Insurance Co. v. *Gamer,* 303 U. S. 161, l. c. 172, which foreshadowed the opinion in the Erie case. The Louisiana jurisprudence and the Louisiana trained District Judge in the case at bar both agree that the petitioners had made a case for the jury. The decision of the Circuit Court of Appeals below substituted its determination on this point for the verdict of a Louisiana jury. The opinion of this Court in the case of *Stoner* v. *New York Life Insurance Co.,* 311 U. S. 464, states clearly that such action is erroneous. The action of the Circuit Court of Appeals is clearly violative of the Seventh Amendment to the Constitution of the United States.

Conclusion.

Petitioners humbly request this Court to exercise its discretionary powers to the end that justice may be served and the judgment of the District Court be reinstated.

Respectfully submitted,

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